

**Preparatory Committee
for the Unified Patent Court**

Consultation Document

Rules on Court fees and recoverable costs

I. Draft Proposal for

A – an amendment of Rule 370 of the Rules of Procedure

Alternative 1

Alternative 2

B – a table of fees

C – a scale of ceilings for recoverable costs

II. Explanatory Note

A. Proposal for an amendment of PART 6 of the Rules of Procedure

Alternative 1

Part 6 – FEES AND LEGAL AID

Court Fees

Rule 370 – Court fees

1. Court fees provided for in these Rules shall be levied in accordance with the provisions contained in this part and the table of fees adopted by the Administrative Committee in accordance with Art. 36 (3) UPCA.

2. A fixed fee shall be paid in accordance with section I (fixed fees) of the table of fees adopted by the Administrative Committee for the following actions:

- (1.) Infringement action [R. 15]
- (2.) Counterclaim for infringement [R. 53]
- (3.) Action for declaration of non-infringement [R. 68]
- (4.) Action for compensation for license of right [R. 80.3]
- (5.) Application to determine damages [R. 132]
- (6.) Appeal pursuant to Rule 220.1 (a) and (b) [R 228]
- (7.) Other counterclaims pursuant to Article 32 (1) (a) UPCA

3. In addition to the fixed fee a value-based fee shall be due in accordance with section II (value-based fees) of the table of fees for those actions of the preceding paragraph, which exceed a value of 500.000 €.

4. For the following procedures and actions a fee shall be paid in accordance with section III (other procedures and actions) of the table of fees adopted by the Administrative Committee:

- (1.) Revocation action [R. 47]
- (2.) Counterclaim for revocation [R. 26]
- (3.) Application for provisional measures [R. 206.5]
- (4.) Application for opt-out [R. 5.5]
- (5.) Application for withdrawal of an opt-out [R. 5.8]
- (6.) Action against a decision of the European Patent Office [R. 88.3, 97.2]
- (7.) Application to preserve evidence [R. 192.5]
- (8.) Application for an order for inspection [R.199.2]
- (9.) Application for an order to freeze assets [R. 200.2]
- (10.) Filing a protective letter [R. 207.3]
- (11.) Application to prolong the period of a protective letter kept on the register [R.207.8]
- (12.) Interlocutory appeals [R. 220.1 (c)]
- (13.) Application for leave to appeal [R. 221]
- (14.) Request for discretionary review [R. 220.2, R. 228]
- (15.) Application for rehearing [R. 250]
- (16.) Application for re-establishment of rights [R. 320.2]
- (17.) Application to review a case management order [R. 333.3]
- (18.) Application to set aside decision by default [R. 356.2]

5. The assessment of the value of the relevant action (Rule 370.3) shall reflect the objective interest pursued by the filing party at the time of filing the action. In deciding on the value, the Court shall in particular take into account the guidelines laid down in the decision of the Administrative Committee for this purpose.

6. Reimbursements of fixed and value-based fees

(a) If the action is heard by a single judge (Rule 345.6.) the party liable for the Court fees will be reimbursed by 25 %.

(b) In case of the withdrawal of an action (Rule 265) the party liable for the Court fees will be reimbursed by:

60 %	if the action is withdrawn before the conclusion of the written procedure
40 %	if the action is withdrawn before the conclusion of the interim procedure

20 %	if the action is withdrawn before the conclusion of the oral procedure
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(c) If the parties have concluded their action by way of settlement the party liable for the Court fees will be reimbursed by:

60 %	if the action is settled before the conclusion of the written procedure
40 %	if the action is settled before the conclusion of the interim procedure
20 %	if the action is settled before the conclusion of the oral procedure

(d) Only one of the reimbursements referred to in subsection (a), (b) and (c) will apply per action and party. Where more than one reimbursement is applicable, the larger will be applied for each party.

(e) In exceptional cases, having regard, in particular, to the stage of the proceedings and the procedural behavior of the party, the Court may decide to deny or decrease the reimbursement according to subsection (b) and (c) of the aforementioned provisions.

7. If the amount of payable Court fees threatens the economic existence of a party who is not a natural person, and has presented reasonably available and plausible evidence to support that the amount of Court fees threatens its economic existence, the Court may upon request by that party, reimburse the fixed fee and reduce the value-based fee to be paid. The request shall be dealt with by the Court without delay. In reaching a decision the Court shall reflect on all circumstances of the case including the procedural behaviour of the party. Before making such a decision the Court may give the other party an opportunity to be heard. A party who is adversely affected by the order may bring an appeal pursuant to Rule 220.2.¹

¹ see on page 21 of the Explanatory Note

Alternative 2:

Part 6 – FEES AND LEGAL AID

Court Fees

Rule 370 – Court fees

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- (7.) Application to preserve evidence [R. 192.5]
- (8.) Application for an order for inspection [R.199.2]
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- (10.) Filing a protective letter [R. 207.3]
- (11.) Application to prolong the period of a protective letter kept on the register [R.207.8]
- (12.) Interlocutory appeals [R. 220.1 (c)]
- (13.) Application for leave to appeal [R. 221]
- (14.) Request for discretionary review [R. 220.2, R. 228]
- (15.) Application for rehearing [R. 250]
- (16.) Application for re-establishment of rights [R. 320.2]
- (17.) Application to review a case management order [R. 333.3]
- (18.) Application to set aside decision by default [R. 356.2]

5. The assessment of the value of the relevant action (Rule 370.3) shall reflect the objective interest pursued by the filing party at the time of filing the action. In deciding on the value, the Court shall in particular take into account the guidelines laid down in the decision of the Administrative Committee for this purpose.

6. The legal persons listed in Article 36 (3) of the Agreement (small and medium sized enterprises, micro-entities, non-profit organizations, universities and public research organizations) may apply for an exemption of value-based fees provided for in Rule 370.3².

² Rule 371 (time period for paying value based fees) shall be amended accordingly:

371.6 Where the Court grants an exemption of value based fees at the request of a party in accordance with rule 370.6, the rules on the obligation as to the time when to pay the value based fees under Rule 371.4 shall not apply. Where the judge-rapporteur rejects the request for an exemption, the party shall pay the value-based fee within 10 days of service of the order determining the value of the dispute or within 10 days of service of the decision of the Court of Appeal rejecting the appeal.

a) Scope (Definitions)

The categories of applicant eligible for the fee exemption are:

(i) 'small and medium-sized enterprise' to be understood as defined in Title I of Annex of the Recommendation of the European Commission n° 2003/361 of 6 May 2003.

(ii) 'non-profit organization' to be understood as a legal person which by its legal form is non-profit-making or which has a legal or statutory obligation not to distribute profits to its shareholders or individual members.

(iii) 'public research organization' to be understood as a legal person established as a non-profit organization by national law or an international organization and whose main objective is carrying out research or technological development.

(iv) 'university' to be understood as a legal entity that is recognized as a higher education establishment by its national education system. It can be a public or a private body.

b) Rules of procedure

(i) application

Before the interim conference, the applicant shall lodge with the Registry an application in the language of the proceedings.

The application shall contain an indication of the reference number of the action in respect of which the application is made. Rule 13 a) and c) shall apply mutatis mutandis.

The application shall contain the electronic form dedicated to the fee exemption and the applicant shall supply copies of the following documents which shall be dated less than three months from the date of the application or relating to the latest approved accounting period:

- Small and medium sized enterprises and micro-entities :
 - Model declaration information on the small or medium sized enterprise qualification (as provided by the European Commission)
 - Balance sheet
 - Profit and loss accounts
 - Staff head count expressed in annual working units
 - For newly established enterprises that have not yet closed accounts: a self-declaration including bona fide estimate for the ongoing financial year
 - For enterprises without turnover whose activity implies a long-time-to-market: document establishing the investment made and the likely expected return to demonstrate that despite the lack of turnover, the enterprise is engaged in an economic activity
 - document establishing the distribution of capital
- Non-profit organization :
 - Official document justifying its legal form under its national law
 - Status document establishing that the organization has a legal or statutory obligation not to distribute profits to shareholders or individual members
- Public research organization:
 - Official document justifying its legal form under its national law
 - Status document establishing that the organization's main objective is carrying out research or technological development and that it has a legal or statutory obligation not to distribute profits to shareholders or individual members
- University :
 - Official document justifying its legal form under its national law
 - Status document establishing that the organization is recognized as a higher education establishment by its national education system

(ii) Examination and Decision

The Registrar shall examine the formal admissibility of the application. If the requirements referred to above have not been met, the applicant shall, as soon as practicable,

- be invited to correct the deficiencies within 14 days and
- be informed that if he fails to correct the deficiencies within the time stated a decision by default may be given, in accordance with Rule 355.

If the requirements referred to above have been met, the decision on such application shall be taken, by way of order, by the judge-rapporteur.

The Court, on its own motion, may order the applicant to supply further documentation. The application shall be dealt with by the Court without delay.

An order refusing the exemption shall state the reasons on which it is based and may be appealed to the Court of Appeal in accordance with rule 220.2.

If the information given by the applicant is found to be wholly or partially incorrect, the Court may, at any time, of its own motion order from the applicant the payment of the full amount of the court fees due.

7. If the amount of payable Court fees threatens the economic existence of a party, who is not a natural person, and has presented reasonably available and plausible evidence to support that the amount of Court fees threatens its economic existence, the Court may upon request by that party, reimburse the fixed fee and reduce the value-based fee to be paid. The request shall be dealt with by the Court without delay. In reaching a decision the Court shall reflect on all circumstances of the case including the procedural behaviour of the party. Before making such a decision the Court may give the other party an opportunity to be heard. A party who is adversely affected by the order may bring an appeal pursuant to Rule 220.2.

B. Table of fees*DRAFT***The Administrative Committee of the Unified Patent Court****Decision**

The Administrative Committee adopts pursuant to Article 36 (3) of the Agreement on a Unified Patent Court the following table of fees:

I. Fixed fees

Actions	Fixed fee
Infringement action [R. 15]	11.000 €
Counterclaim for infringement [R. 53]	11.000 €
Action for declaration of non-infringement [R. 68]	11.000 €
Action for compensation for license of right [R. 80.3]	11.000 €
Application to determine damages [R. 132]	3.000 €
Appeal pursuant to Rule 220.1 (a) and (b) [R 228]	16.000 €
Other counterclaims pursuant to Article 32 (1) (a) UPCA	11.000 €

II. Value-based fees

Value of action	additional value-based fee
Up to and including 500.000 €	0 €
Up to and including 750.000 €	2.500 €

Value of action	additional value-based fee
Up to and including 1.000.000 €	5.000 €
Up to and including 1.500.000 €	10.000 €
Up to and including 2.000.000 €	15.000 €
Up to and including 3.000.000 €	20.000 €
Up to and including 4.000.000 €	25.000 €
Up to and including 5.000.000 €	30.000 €
Up to and including 6.000.000 €	35.000 €
Up to and including 7.000.000 €	40.000 €
Up to and including 8.000.000 €	45.000 €
Up to and including 9.000.000 €	50.000 €
Up to and including 10.000.000 €	55.000 €
Up to and including 15.000.000 €	70.000 €
Up to and including 20.000.000 €	85.000 €
Up to and including 25.000.000 €	115.000 €
Up to and including 30.000.000 €	150.000 €
more than 30.000.000 €	220.000 €

III. Other procedures and actions

Procedures/actions	Fixed Fee
Revocation action [R. 47]	20.000 €
Counterclaim for revocation [R. 26]	same fee as the infringement action subject to a fee limit of 20.000 €
Application for provisional measures [R. 206.5]	11.000 €
Application for opt-out [R. 5.5]	80 €
Application for withdrawal of an opt-out [R. 5.8]	80 €

Procedures/actions	Fixed Fee
Action against a decision of the European Patent Office [R. 88.3, 97.2]	1.000 €
Application to preserve evidence [R. 192.5]	350 €
Application for an order for inspection [R. 199.2]	350 €
Application for an order to freeze assets [R. 200.2]	3.000 €
Filing a protective letter [R. 207.3]	200 €
Application to prolong the period of a protective letter kept on the register [R. 207.8]	100 €
Interlocutory appeals [R. 220.1(c.), 228]	3.000 €
Application for leave to appeal [R. 221, 228]	3.000 €
Request for discretionary review [R. 220.2, 228]	1.500 €
Application for rehearing [R. 250]	2.500 €
Application for re-establishment of rights [R. 320.2]	350 €
Application to review a case management order [R. 333.3]	300 €
Application to set aside decision by default [R. 356.2]	1.000 €

C. Scale of ceilings for recoverable costs*DRAFT***The Administrative Committee of the Unified Patent Court****Decision**

The Administrative Committee adopts pursuant to Art. 69 of the Agreement on a Unified Patent Court and pursuant to Rule 152 (2) of the Rules of Procedure the following Scale of ceilings for recoverable costs:

Scale of ceilings for recoverable costs:

Value of action	Ceiling for recoverable costs of representation per instance and party
Up to and including 250.000 €	Up to 50.000 €
Up to and including 500.000 €	Up to 75.000 €
Up to and including 1.000.000 €	Up to 150.000 €
Up to and including 2.000.000 €	Up to 200.000 €
Up to and including 4.000.000 €	Up to 400.000 €
Up to and including 8.000.000 €	Up to 600.000 €
Up to and including 16.000.000 €	Up to 800.000 €
Up to and including 30.000.000 €	Up to 1.000.000 €
Up to and including 50.000.000 €	Up to 1.500.000 €
More than 50.000.000 €	Up to 3.000.000 €

II. Explanatory Note

A Rule 370 of the Rules of Procedure

The Unified Patent Court Agreement (in the following “the Court” and “the Agreement”) contains a set of principles on which the structure and the level of Court fees have to be built.

Article 36 (1) of the Agreement contains the principle that the budget of the Court shall be financed by the Court’s own financial revenues, namely Court fees (Article 36 (2) of the Agreement) paid by the parties (Article 70 of the Agreement), and, at least in the transitional period referred to in Article 83 of the Agreement, as necessary by contributions from the Contracting Member States. Where the Court is unable to balance its budget out of its own resources, the Contracting Member States shall remit special financial contributions (Article 36 (4) of the Agreement).

As to the structure of Court fees the Agreement provides in Article 36 (3) that the Court fees shall consist of a fixed fee, combined with a value-based fee above a predefined ceiling. In this context the “Declaration of the Contracting Member States concerning the preparations for the coming into operation of the Unified Patent Court” specifies that the Signatory States consider that the fee system of the Court should be straightforward and predictable for the users. Accordingly, the Court should apply a mixed system of fixed and value-based fees. To this end the Legal Working Group presented its draft proposal to the Preparatory Committee PC/08/180314 setting out – on the basis of the draft Rules of Procedure – the individual procedures for which fixed fees and value-based fees should be paid.

On this basis the Legal and Financial Working Groups suggested an appropriate level of Court fees. The basis is formed of estimates of the expected volume of activity, staff and operating costs. These estimates together serve as a point of reference for the calculation of the Court fees which at the end of the transitional period will need to ensure a self-financing

state. The fee levels suggested are the lowest that will enable sustainability of the Court.

Alternative proposals on the implementation of Article 36 (3) of the Agreement:

Article 36 (3) of the Agreement states further that “The Court fees shall be fixed at such a level as to ensure a right balance between the principle of fair access to justice, in particular for small and medium-sized enterprises, micro-entities, natural persons, non-profit organizations, universities and public research organizations and an adequate contribution of the parties for the costs incurred by the Court, recognizing the economic benefits to the parties involved, and the objective of a self-financing Court with balanced finances. (...) Targeted support measures for small and medium-sized enterprises and micro entities may be considered”. The Declaration attached to the Agreement develops this point further and suggests, that “The Court should be accessible for parties with limited resources. (...) The fee system should provide adequate and specific tools to ensure proper access for small and medium-sized enterprises, micro entities, natural persons, non-profit organizations, universities and public research organizations to the Unified Patent Court, especially in relation to cases of high economic value”.

Implementation of Article 36 (3) of the Agreement can be viewed in various ways, hence the presentation of two different proposals. In the first proposal support is given to all, focusing on particular behaviours (Alternative 1). In the second proposal, support is targeted at legal persons listed in Article 36.3 (Alternative 2). Both proposals are explained further below and have been subjected to the same case load assumptions.

1. Alternative 1

Alternative 1 presents reimbursements to reward particular behaviours, for example early settlement. Whilst support does not overtly target one group above another, it is intended that these types of reimbursements will particularly appeal to small and medium-sized enterprises (SMEs).

Rule 370 (6) of Alternative 1 provides for fee-reimbursements

- if the action is heard by a single judge,
- in case of the withdrawal of action and
- if the parties have concluded their action by way of settlement.

It is assumed that in all these cases the Court has to work less. Therefore, a reduced fee seems reasonable. In order to prevent misuse the Court is allowed to deny or to decrease the level of reimbursement depending on all circumstances.

Alternative 1 was designed as part of a wider package of measures that - whilst available to all - are understood to be generally preferred by SMEs and the other entities listed above. These include: a rebate/reduction where the amount of Court fees threatens a party's economic existence [Rule 370 (7), see 3. below] and detailed guidance on how to use the Court. It has been suggested that legal costs will be more of an issue for SMEs than Court fees and so patent insurance schemes that would reimburse both are also being investigated.

2. Alternative 2

Alternative 2 presents a fee structure that comprises specific measures to be included in the Rules on Court fees to reduce the level of the fees borne by the legal person listed in Article 36 (3) of the Agreement (SMEs, non-profit organizations, universities and public research organizations).

Rule 370.6 provides the possibility for the legal persons listed in Article 36 (3) to apply for an exemption of value-based fees provided for in Rule 370.3.

In order to ensure a uniform application of this measure by the various divisions of the Court, Rule 370.6 refers to European standardized definitions of each category of legal person targeted in Article 36 (3) of the Agreement. It refers particularly to the SME definition given by the European Commission in its Recommendation n° 2003/361/EC of 6 May 2003. As Article 1.2 of this Recommendation states, Member States “are invited to comply with Title 1 of the Annex for their programmes directed towards medium-sized enterprises, small enterprises and microenterprises”. In order to facilitate the examination of the application by the judge, and to prevent the risk of abuse, the applicant shall supply the Model declaration information on small or medium sized enterprise qualification as provided by the European Commission in its Commission communication 2003/C 118/03.

For the application to be examined precisely and with reliable data, the list of documents that must be provided to apply for the exemption is inspired by the list of documents requested in the Horizon 2020 Programme in the European Commission ‘Guide on beneficiary registration, validation and financial viability check’ (11 April 2014).

This measure is independent from the fee reduction/reimbursement provided for in Rule 370.7 which will apply to all parties facing economical difficulty (ie bankruptcy) and from any other measure that could be additionally granted to help the legal persons listed in Article 36.3 to have fair access to justice.

The wider package of measures referred to in Alternative 1 will also apply to Alternative 2. These measures include detailed guidance on how to use the Court. It has been suggested that legal costs will be more of an issue for SMEs than Court fees and so patent insurance schemes that would reimburse both are also being investigated.

3. Fee reduction / reimbursement when the economic existence of a party is threatened

According to Rule 370.7 of Alternative 1 and Alternative 2 the Court may upon request by a party who is not a natural person, reimburse the fixed fee and reduce the value-based fee to be paid if the payment of those fees threatens the economic existence of that party. Such a request shall be administered by the Court without delay. Natural persons are excluded from Rule 370.7 as they may apply for legal aid as stated in Article 71 of the Agreement and as detailed in Rules 375-382.

B. Schedule for fixed and value-based fees

I. Structure

1. Fixed fee

It is assumed that 25% of actions filed at the Court will fall below a threshold of 500.000 €. The experience in Germany, one of the few Member States who operate a value-based system, has shown that nearly one quarter of cases has a value of up to 250.000 €. As the EU-wide scope of UPC judgments will increase the value, we have doubled this amount to reach our proposed threshold for the value-based fee.

2. Value-based fee

The consideration that users with more significant economic interests should provide a corresponding contribution to the Court is reflected in Table II.

Again using experience in Germany as a guide, it is estimated that 90 % of all actions will have a value of up to 4.000.000 €.

3. Revocation actions and counterclaims for revocation

The proposed fee structure for revocation actions and counterclaims for revocation is the following: a revocation action should be subject to a fixed fee only of 20.000 € while a counterclaim for revocation should be subject to the same amount of court fees as the initial infringement action up to a cap of 20.000 €. This means that the defendant filing a counterclaim for revocation pays the same court fee as the claimant of the infringement action but the fee of the counterclaim for revocation will never exceed the fixed fee for a revocation action, i.e. 20.000 €.

II. Level

The proposed Court fees are based on estimates of costs and volumes. It is clear from the Agreement that contracting Member States will have to

subsidise the Court through its early life and through the provision of facilities and, during the transitional period, of administrative support staff.

Costs are estimated to be around 37.000.000 € in year 8. As these costs can only be fairly roughly estimated until the Court is established, it will be essential that the Court regularly reviews fees and costs based on its work load.

The costs implications in terms of the increased administrative burden of the proposed Rule 370.6 and 370.7 of Alternative 1 and Alternative 2 have yet to be fully evaluated.

Application for opt-out and withdrawal of an opt-out:

It is intended that the fees for both the opt-out and the withdrawal of the opt-out are set to reclaim administrative costs only, it is not the intention of the Court to profit from either of these. For European patents the opt-out fee refers to each patent and not designation (see Rule 5).

C Scale of ceilings for recoverable costs

According to Article 69 (1) of the Agreement the unsuccessful party shall bear reasonable and proportionate costs and other expenses incurred by the successful party up to a ceiling set in accordance with the Rules of Procedure. The issue of recoverable costs consists of two parts: (1.) the specification of which costs shall be recoverable and (2.) the determination of a ceiling for the recoverable costs.

1. Recoverable costs

According to Rule 150 the costs incurred in the proceedings by the Court as well as the costs of the successful party are recoverable costs [e.g. costs for simultaneous interpretation, witnesses (R. 180 RoP), court experts (R. 185.7 RoP), experiments (R. 201 RoP), letters rogatory (R. 202 RoP) representation (R. 152 RoP) and Court fees].

2. Ceiling for recoverable costs

As regards the ceiling for the recoverable costs the first question is whether all those costs should be subject to a ceiling. It follows from Rule 152.1 that the successful party shall be entitled to recover reasonable and proportionate costs for representation. In Rule 152.2 the Administrative Committee shall adopt a scale of recoverable costs which shall set ceilings for such costs by reference to the value of the dispute. This scale may be adjusted from time to time.

The aim of a cost-ceiling is to safeguard the losing party against excessive cost burdens. The threat of such cost burdens does not emanate from costs incurred by the Court, but rather from the expenses incurred by the other party, especially the costs for representatives. The Court fees will not be an unreasonable and unpredictable cost factor.

Against this background it is appropriate that representation costs should be subject to a ceiling. Furthermore, Rule 153 and 155 refer to which rates of payment experts, interpreters and translators should be compensated with.

Having determined the costs for which a ceiling has to be adopted it is necessary to propose an appropriate structure for a scale of these recoverable costs. It is possible to establish only one ceiling for all recoverable costs. However, such an approach would not seem to adequately take into account the fact that costs incurred may differ according to the value of the dispute. Therefore, it seems preferable that the extent of recoverable costs depends on the value of the dispute, which is in conformity with Rule 152 (2).

Due to the fact that there is no common legal basis within the 25 Member States as to the question of what reasonable representation costs are and when they become excessive, a wide range of ceilings has been discussed. For example, for a case with value up to 500.000 € the discussed ceilings ranged from 24.000 € to 200.000 € per instance, i.e. differing almost by a factor of 10. In this context, the proposed ceilings are steering a middle course and are the result of a compromise reached after thorough discussions.

It should however be noted that some delegations regard a ceiling above 1.000.000 € as excessive.

In the light of practice of the Agreement the ceilings may in the future be adjusted according Article 69 (1) of the Agreement and Rule 152.2.

It is proposed that each ceiling for recoverable costs of representation is applicable per instance and party.

D. Assessment of the value of the action

Whether a value-based fee has to be paid depends in principal on two requirements: the specific action and the value of the action. Only if the value of the action exceeds a certain amount, which is covered by the fixed fee, the consequence of a value-based fee is activated.

Rule 370.5 states:

“The assessment of the value of the relevant action shall reflect the objective interest pursued by the filing party at the time of filing the action.”

Usually, the objective interest differs from action to action. As only few European court systems have experience with court fees based on the case value, experience of evaluating an action is limited. Against this background guidelines will be provided in order to facilitate the work of the Court in its first years, until case law of the Court has been developed.